

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EDWARD SEAMAN	:	DETERMINATION
	:	DTA NO. 819318
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Tax Periods Ended June 30, 1996 through	:	
December 31, 1997.	:	

Petitioner, Edward Seaman, 2 Ardsley Circle, Rockville Centre, New York 11570, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the tax periods ended June 30, 1996 through December 31, 1997.

The Division of Taxation ("Division"), by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated July 9, 2004 seeking an order dismissing the petition and granting summary determination in favor of the Division pursuant to sections 3000.5, 3000.9(a)(1), and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.5, 3000.9[a][1], and 3000.9[b]). Petitioner, who is not represented in this matter, did not respond to the Division's motion. Pursuant to 20 NYCRR 3000.5(d), the 90-day period for issuance of this determination commenced August 9, 2004. After due consideration of the documents and arguments submitted, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. Petitioner, Edward Seaman, filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of notices of deficiency L-014911811, L-014911812, L-014911813, L-014911814, L-014911815, and L-014911816.

2. Following a conciliation conference on July 8, 1999, BCMS issued a Conciliation Order to petitioner (CMS No. 169571) dated October 29, 1999, which denied petitioner’s request and sustained notices of deficiency L-014911811, L-014911812, L-014911813, L-014911814, L-014911815, and L-014911816.

3. On January 21, 2003, petitioner filed a petition with the Division of Tax Appeals seeking a redetermination of notices of deficiency L-014911811, L-014911812, L-014911813, L-014911814, and L-014911816.

4. In support of its motion, the Division submitted the affidavits of Robert Farrelly and Bruce Peltier, both employees of the Division. The Division also submitted a copy of the subject October 29, 1999 Conciliation Order, a copy of the certified mail record (“CMR”) containing a list of the conciliation orders assertedly issued by BCMS on October 29, 1999, and a copy of a computer record of petitioner’s 1998 New York income tax return.

5. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by United States Postal Service (“USPS”) certified mail and confirmation of the mailing through BCMS’s receipt of a postmarked copy of the CMR.

6. The BCMS word processing unit prepares the conciliation orders. The word processing unit forwards the conciliation orders to the conciliation conferee for signature, who then

forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

7. The BCMS word processing unit also prepares the certified mail records. The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The clerk, as part of her regular duties, verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer and records, on the CMR, under the heading "Certified No.," the certified control number from each envelope.

8. Each page of a CMR is a separate CMR for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual CMR for the receiving postal employee to initial.

9. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR attached to his affidavit which contains a list of the conciliation orders issued by the Division on October 29, 1999 including, on page four, an order addressed to petitioner, Edward Seaman, 2 Ardsley Circle, Rockville Centre, New York 11570-2007. There are eleven certified control numbers running consecutively from Z418087976 through Z418087986 on page four of the CMR. Corresponding to each certified control number are the names and addresses of taxpayers. The certified control number corresponding to the entry listing petitioner's name and address is Z418087984. Each page of the four-page CMR is date-stamped October 29, 1999 by the Colonie Center branch of the USPS in Albany, New York, and each page contains a postal service employee's initials verifying receipt as well. At the bottom of page four, the page on

which petitioner's name and certified control number are listed, the number "11" has been filled in as the "Total Number of Pieces listed by Sender" and the number "11" has also been filled in as the "Total Number of Pieces Received at Post Office."

10. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Division's Registry Unit, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office. In this particular instance, the postal employee affixed a postmark to the CMR, wrote in the "Total Number of Pieces Received at Post Office" and initialed the CMR to indicate that 11 pieces were the total number of pieces received at the post office. Mr. Peltier's knowledge that the postal employee wrote in the "Total Number of Pieces Received at Post Office" for the purpose of indicating that 11 pieces were received was based on the fact that the Division's Mail Processing Center specifically requested that the postal employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the mail record.

11. The CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's

staff on the following day after its initial delivery and is then delivered to the originating office. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on October 29, 1999, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Edward Seaman, 2 Ardsley Circle, Rockville Centre, New York 11570-2007 to the Colonie Center branch of the USPS in Albany, New York in a sealed envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on October 29, 1999 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioner on October 29, 1999.

12. The Division's computer record of petitioner's 1998 New York income tax return filed on April 15, 1999, lists as petitioner's address 2 Ardsley Circle, Rockville Centre, New York 11570.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Farrelly and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne*

& Nagel v. Baiden, supra, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

C. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b) the conciliation order in this case and the underlying statutory notices would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) conciliation orders (*see*, Findings of Fact “5” and “10”).

G. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject conciliation order was mailed as addressed on October 29, 1999. Specifically, this document lists sequentially numbered certified control numbers with corresponding names and addresses and bears a U.S. Postal Service postmark dated October 29, 1999. Additionally, a postal employee wrote “11” next to the total pieces received heading and initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see, Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. As noted herein, petitioner’s petition was filed on January 21, 2003. This date falls well beyond the 90-day period of limitations for the filing of a petition and was therefore untimely (*see*, Tax Law § 689[b]; § 170[3-a][a]).

I. The Division of Taxation’s motion for summary determination is granted, and the petition of Edward Seaman is dismissed with prejudice.

DATED: Troy, New York
September 2, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE